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11
12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION
15

16 IN RE CAPACITORS ANTITRUST LITIGATION

17 THIS DOCUMENT RELATES TO ALL DIRECT
18 PURCHASER CLASS ACTIONS AND
FLEXTRONICS'S ACTION

Master File No. 3:14-cv-03264-JD

**DIRECT PURCHASER PLAINTIFFS'
MOTION TO STRIKE TAITSU
CORPORATION AND TAITSU
AMERICA'S SUPPLEMENTAL REPLY
OR, IN THE ALTERNATIVE, FOR
LEAVE TO FILE A SUR-REPLY**

21 Date: January 13, 2016
22 Time: 10:00 a.m.
Courtroom: 11 19th Floor
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1 Direct Purchaser Plaintiffs (“DPPs”) submit the following motion to strike Defendants Taitso
2 Corporation and Taitso America’s Supplemental Reply (Dkt. 989) or, in the alternative, for an order
3 granting DPPs leave to file a sur-reply.¹

4 **I. INTRODUCTION AND STATEMENT OF RELEVANT FACTS**

5 On September 30, 2015, the Court entered a Stipulation and Order allowing Defendants to “file
6 a Motion for Partial Summary Judgment on FTAIA grounds of no greater than 30 pages” Dkt. 904
7 at 2. The Order did not, however, grant Defendants any additional pages for their reply brief. Nor did it
8 contemplate—or permit—separate briefs by any of the Defendants. In the Stipulation, the parties,
9 including Taitso, jointly told the Court that increasing the page limits was “appropriate because, in
10 order to simplify the proceedings and promote efficiency and judicial economy, the 36 Defendants listed
11 above (comprising 17 Defendant families) will be filing a single Motion for Partial Summary Judgment . .
12 . .” *Id.* at 1.

13 Consistent with the Stipulation and Order, Defendants filed a single joint motion for partial
14 summary judgment (the “Joint Motion”) on FTAIA grounds on October 1, 2015. Dkt. 915. Taitso
15 signed the Joint Motion, which did not contain any arguments unique to any particular Defendant and
16 did not cite to any specific evidence that would support the dismissal of claims against particular
17 Defendants. Taitso did not file its own motion. Although each Defendant submitted short declarations,
18 Defendants’ joint reply brief expressly disclaimed any importance of this evidence.² Defendants
19 asserted that the issues their motion places before the Court were purely legal. *See, e.g.*, Dkt. 985 at 1; 2,
20 n. 1; 10-11, n. 18 (the “Joint Reply”).

21 On November 23, 2015, DPPs and Flextronics submitted an opposition brief to the Joint
22 Motion. Dkt. 967-4 (redacted); Dkt. 967-5 (unredacted) (“Opposition”).

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25 ¹ Plaintiff Flextronics supports the requested relief sought herein.

26 ² *See* Dkt. 985 at 2, n. 1 (“Defendants’ Motion is not asking the Court to determine the percentage of
27 sales in each category. This information is provided to give the Court a sense of the magnitude of sales
28 in each category. Defendants seek only a ruling on which of the categories are beyond the reach of the
Sherman Act under the FTAIA.”); *see id.* at 3 (“Defendants submitted declarations solely to establish
where their factories and sales operations are, and that the vast majority of their sales were sold and
shipped to foreign purchasers.”).

1 On December 18, 2015, Defendants filed their Joint Reply. Taitso signed the Joint Reply, which
2 again did not include any arguments unique to any particular Defendant.

3 On the same day, Taitso filed its own separate, supplemental reply brief, raising several new
4 arguments and pointing to new pieces of evidence that were not discussed in the Joint Motion. Taitso
5 now asks the Court to grant summary judgment in Taitso's favor based on additional facts purportedly
6 unique to itself that were not submitted until filing its reply.

7 Taitso's request is procedurally improper. This type of individual filing—which comes after the
8 parties agreed to joint submissions and after Defendants filed the Joint Motion—is inefficient and a
9 waste of judicial resources. For the reasons below, DPPs respectfully request that the Court either: (1)
10 strike Taitso's Supplemental Reply and supporting papers; or (2) grant DPPs leave to file a short sur-
11 reply addressing the merits of Taitso's newly raised arguments and evidence.³

12 **II. ARGUMENT**

13 **A. Taitso's Supplemental Reply Conflicts with the Parties' Agreement, the Court's** 14 **Order, and the Local Rules.**

15 As noted above, the parties agreed and the Court ordered that Defendants would submit a single
16 motion not to exceed 30 pages. Dkt. 904 at 2. The parties submitted to the Court that the increase in
17 page limits was "appropriate because, in order to simplify the proceedings and promote efficiency and
18 judicial economy, the 36 Defendants listed above (comprising 17 Defendant families) will be filing a
19 single Motion for Partial Summary Judgment" *Id.* at 1. The parties did not agree, however, that
20 Defendants would then submit individual briefs on reply, raising new arguments and submitting new
21 evidence that pertain to the circumstances of individual Defendants. Taitso's Supplemental Reply flies
22 in the face of the parties' agreement and frustrates the parties' efforts to "promote efficiency and
23 judicial economy." It is improper and unfair for Defendants to file a joint motion containing arguments
24 of general application, and then on reply to submit individual briefs raising new individualized issues.

25 Moreover, Defendants' two submissions—the joint reply brief and Taitso's supplemental reply
26 brief—exceed the page limits under Local Rule 7-4(b). That rule limits reply briefs to 15 pages. *Id.* The
27

28 ³ The proposed sur-reply is attached as Exhibit A.

1 joint reply alone is 15 pages. And Taitsu’s supplemental reply is 6 pages. The parties did not agree to—
2 and the Court did not allow—additional pages for Defendants’ reply brief under Local Rule 7-4(b). This
3 procedural violation suffices to strike Taitsu’s Supplemental Reply. *See Sanders v. Astrue*, 2013 U.S. Dist.
4 LEXIS 46029, *11-12 (N.D. Cal. Mar. 28, 2013) (striking all pages beyond the page limit set by the Local
5 Rules).

6 **B. Taitsu’s Supplemental Reply Introduces New Arguments and New Evidence That**
7 **Should Be Stricken.**

8 Taitsu’s Supplemental Reply comprises new arguments not made in the Joint Motion and relies
9 on evidence not previously submitted in connection with the Joint Motion. “It is well accepted that
10 raising of new issues and submission of new facts in [a] reply brief is improper.” *Roe v. Doe*, 2009 U.S.
11 Dist. LEXIS 59440, at *14 (N.D. Cal. June 30, 2009) (granting motion to strike portions of reply brief
12 constituting new evidence raised for the first time in reply, and refusing to consider such evidence)
13 (citing *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 682 (S.D. Cal. 1999)); *Contratto v. Ethicon, Inc.*, 227
14 F.R.D. 304, 308, n.5 (N.D. Cal. 2005) (granting motion to strike portions of declaration introducing new
15 evidence not presented in motion or opposition) (citations omitted). The reply and supporting
16 documents should therefore be stricken.

17 In Taitsu’s supplemental reply, it claims for the first time that Plaintiffs cannot satisfy the first
18 prong of the domestic effects exception—whether the Defendants’ conduct had a direct, substantial,
19 and reasonably foreseeable effect on U.S. commerce—on the following new purported grounds: that
20 Taitsu’s sales to the United States were too small;⁴ that Taitsu’s sales in the United States were made by
21 Taitsu America, not Taitsu Corporation; and that Taitsu did not target the U.S. economy or charge the
22 same prices to corporate families. Taitsu Reply at 5.

23 But Defendants did not make any of these arguments in the Joint Motion or in the Joint Reply.
24 Indeed, Defendants effectively conceded that DPPs’ claims satisfy the direct effects prong of the

26 ⁴ Taitsu also disputes the second prong of the domestic effects exception—that the domestic effects
27 “give rise to,” *i.e.*, proximately cause a plaintiff’s claim—on the same grounds that it is too small. In the
28 Joint Motion, Defendants did not make any arguments about the size of particular defendants, or the
size of U.S. commerce involved in this case, as a reason to find a lack of proximate causation under the
second prong of the domestic effects exception.

1 domestic effects exception. In the Joint Reply, Defendants clarify that they dispute the direct effects
2 prong only “to the extent that DPPs and Flextronics USA are seeking recovery for their foreign sale of
3 capacitors that were incorporated into finished goods imported in the U.S.” Joint Reply at 12. But DPPs
4 have made it clear that they bring claims only on behalf of direct purchasers of capacitors—not on
5 behalf of entities that purchased finished products that incorporate capacitors. Opposition at 21.
6 Accordingly, Taitso’s arguments are not only new, they conflict with the position taken in the
7 Defendants’ joint submissions. These new arguments should be stricken or not considered.

8 In making these new arguments, Taitso relies on new evidence. In particular, Taitso submitted
9 another declaration by Ken Kobayashi as well testimony from his deposition. *See* Exhibits A-L to Taitso
10 Reply. In particular, the new Kobayashi Declaration contains many assertions that Taitso could have
11 made in the Joint Motion but it instead chose to make after DPPs filed their opposition, including
12 statements about competition with Chinese manufacturers (Kobayashi Second Decl. ¶ 5); whether
13 capacitors are interchangeable commodity products (Kobayashi Second Decl. ¶ 7); the “arm’s-length”
14 nature of Taitso’s negotiations with customers (Kobayashi Second Decl. ¶ 8); the ability of Taitso sales
15 subsidiaries to set their own prices (Kobayashi Second Decl. ¶ 11); how Taitso prices capacitors to
16 corporate families (Kobayashi Second Decl. ¶ 12); information related to its decision whether to
17 continue Taitso America’s sales operations (Kobayashi Second Decl. ¶¶ 13-16); and “updated”
18 summary sales records (Kobayashi Second Decl. ¶¶ 17-18, Exhs. 1 and 2). These materials should be
19 stricken as well. Although Taitso may now recognize the Joint Motion fails, Taitso is not permitted a
20 second bite at the apple. This is not a multiple choice test.

21 **C. Alternatively, DPPs Should Be Given Leave to File a Sur-Reply.**

22 In the alternative, DPPs request an opportunity to submit a sur-reply to address the new
23 arguments and evidence raised by Taitso.⁵ This request is supported by the reasons discussed above. *See*
24 *GT Nexus, Inc. v. Intra, Inc.*, 2014 U.S. Dist. LEXIS 93469, *2 (N.D. Cal. July 9, 2014) (“If a party
25 raises a new argument or presents new evidence in a reply brief, a court may consider these matters
26 only if the adverse party is given an opportunity to respond.”) (citing *El Pollo Loco v. Hashim*, 316 F.3d
27 1032, 1040-41 (9th Cir. 2003)).

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⁵ The proposed sur-reply is attached as Exhibit A.

1 **III. CONCLUSION**

2 For the reasons stated above, DPPs request that the Court strike Taitso's Supplemental Reply
3 and supporting papers or, in the alternative, issue an order granting DPPs leave to file a sur-reply.
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5 Dated: January 7, 2016

JOSEPH SAVERI LAW FIRM, INC.

6 By: /s/ Joseph R. Saveri
7 Joseph R. Saveri

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19 *Interim Lead Class Counsel for Direct Purchaser Plaintiffs*

1 **CERTIFICATE OF SERVICE**

2 I, the undersigned, am employed by the Joseph Saveri Law Firm, Inc. My business address is 555
3 Montgomery Street, Suite 1210, San Francisco, California 94111. I am over the age of eighteen and not a
4 party to this action.

5 On January 7, 2016, I electronically filed the foregoing document and attachments with the Clerk
6 of the Court using the CM/ECF system, and served a copy on all counsel of record via the CM/ECF
7 System.

8 I declare under penalty of perjury that the foregoing is true and correct. Executed on January 7,
9 2016, at San Francisco, California.

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11 By: /s/ Ryan J. McEwan
12 Ryan J. McEwan
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